MOTION FILED
AUG 18 1992

No. 92-172

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO,
Petitioner,
vs.
NORRIS JONES,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI; AND BRIEF OF THE COLORADO ATTORNEY GENERAL AND THE ELEVEN STATES THAT APPEAR ON THE INSIDE COVER AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

GALE A. NORTON*
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
JOHN DANIEL DAILEY
Deputy Attorney General
Attorneys for Amici Curiae
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-3057
***Counsel of Record**

LARRY ECHOHAWK
Attorney General for the
State of Idaho

LINLEY E. PEARSON
Attorney General for the
State of Indiana

ROBERT T. STEPHAN
Attorney General for the
State of Kansas

HUBERT H. HUMPHREY
Attorney General for the
State of Minnesota

MICHAEL C. MOORE
Attorney General for the
State of Mississippi

MARC RACICOT
Attorney General for the
State of Montana

FRANKIE SUE DEL PAPA
Attorney General for the
State of Nevada

ERNEST D. PREATE
Attorney General for the
State of Pennsylvania

JEFFREY L. AMESTOY
Attorney General for the
State of Vermont

MARK BARNETT
Attorney General for the
State of South Dakota

JEFFREY L. AMESTOY
Attorney General for the
State of Vermont

MARIO J. PALUMBO
Attorney General for the
State of West Virginia

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Colorado Attorney General and eleven other states, sponsored by their respective attorney generals, move for leave to file a brief in support of the petition for writ of certiorari for the following reasons:

1. Pursuant to Rule 37.5 of the Rules of this Court, normally neither the consent of the parties nor a motion for leave to file an *amicus* brief is necessary when the *amicus* brief is sponsored by a state attorney general's office. Nonetheless, either consent or a motion could be required here because the Colorado Attorney General may not be considered the state sponsor where the state already appears through the representation of another governmental entity in the caption of the case.

2. The respondent, through his counsel, the Colorado State Public Defender, has refused to consent to the filing of the *amici* brief.

3. The *amici curiae* have a substantial interest in seeing this holding reviewed because they are all organizations with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the Fourth and Fourteenth Amendments of the United States Constitution, both of which are binding on the *amici*.

4. The brief of the *amici curiae* sets forth the question of law raised by the Colorado Supreme Court opinion in a broader context than that presented by petitioner. Perhaps more importantly, the *amici* brief serves to further demonstrate the source of the confusion surrounding this issue and the need for this Court's

authoritative guidance on the point.

GALE A. NORTON*
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

Attorneys for the Amici Curiae

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-3057
***Counsel of Record**

No. 92-172

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO,
Petitioner,
vs.
NORRIS JONES,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

GALE A. NORTON*
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
JOHN DANIEL DAILEY
Deputy Attorney General
Attorneys for Amici Curiae
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-3057
***Counsel of Record**

QUESTION PRESENTED FOR REVIEW

Whether the independent source doctrine, rather than the attenuation doctrine, governs the admissibility of confessions obtained after police have discovered separate and adequate grounds to justify what was initially an illegal arrest.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

INTRODUCTORY STATEMENT 1

STATEMENT OF THE CASE 1

INTEREST OF AMICI CURIAE 2

REASONS FOR GRANTING THE WRIT 3

I. The Colorado Supreme Court Has Decided An Important Question of Federal Law Which Has Not Been, But Which Should Be, Settled By this Court. Lower Courts Throughout the Country Are Struggling to Properly Assess the Impact of Police Discovery of Intervening, Independent, and Adequate Grounds to Arrest Upon the Admissibility of Confessions Which Would Otherwise Be Suppressible As Fruits of Illegal Arrests. The Courts Have Inconsistently Applied An Attenuation Analysis, Rather than the Much Simpler and More Appropriate Independent Source Doctrine. This Has Resulted In the Suppression of Highly Relevant and Reliable Evidence For Reasons Wholly Unrelated to Either the Actual Harm Suffered by the Suspect or A Proper Consideration of the Role of Deterring Police Misconduct. 3

TABLE OF CONTENTS

PAGE

CONCLUSION 9

TABLE OF AUTHORITIES

CASES **PAGE**

Brown v. Illinois, 422 U.S. 590 (1975) 2, 3, 5-7, 9

Government of Virgin Islands v. Gerau, 502 F.2d 914 (3rd Cir. 1974) 7

Johnson v. Louisiana, 406 U.S. 356 (1972) 5, 6

Miranda v. Arizona, 384 U.S. 436 (1966) 1

Murray v. United States, 487 U.S. 533 (1988) 5

Nardone v. United States, 308 U.S. 338 (1939) 4

New York v. Harris, 110 S.Ct. 1640 (1990) 6-8

Nix v. Williams, 467 U.S. 431 (1984) 5

People v. Jones, 828 P.2d 797 (Colo. 1992) 2, 9

Scott v. United States, 436 U.S. 128 (1978) 8

Segura v. United States, 468 U.S. 796 (1984) 5

Silverthorne Lumber Company v. United States, 251 U.S. 385 (1926) 4

State v. Thompson, 438 N.W.2d 131 (1989) 7

Taylor v. Alabama, 457 U.S. 687 (1982) 6, 7

TABLE OF AUTHORITIES

CASES **PAGE**

United States v. Calandra, 414 U.S. 338 (1974) 8

United States v. Ceccolini, 435 U.S. 268 (1978) 5

United States v. Leon, 468 U.S. 897 (1984) 5

Whiteley v. Warden, 401 U.S. 560 (1971) 8

Wicker v. State, 667 S.W.2d 137 (Tex. Ct. Crim. App. 1984) 4

Wong Sun v. United States, 371 U.S. 471 (1963) 4, 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 2, 4, 8, 9

U.S. Const. Amend. V 5

U.S. Const., Amend. XIV 2

TABLE OF AUTHORITIES

OTHER AUTHORITIES **PAGE**

OTHER AUTHORITIES

W. LaFave *Search and Seizure* (4th ed. 1987)

Vol. 1, § 1.4(d) at 90 9

Vol. 2, § 3.5(d) at 20 n.71 8

Vol. 4, § 11.4(a) at 374-78 5

Vol. 4, § 11.4(b) at 392 9

INTRODUCTORY STATEMENT

Pursuant to Rule 37 of the rules of this Court, the Colorado Attorney General and the amici states by their Attorneys General respectfully submit this Brief as *amici curiae* in support of petitioner here.

STATEMENT OF THE CASE

The respondent here was charged in Denver, Colorado, with first-degree murder. On interlocutory appeal by the local district attorney, the Colorado Supreme Court upheld the suppression of the murder weapon and statements which respondent gave to the police.

Respondent confessed twice to police following what was later determined to be an illegal arrest. Respondent had waived his *Miranda*[1] rights before each statement, and between the two statements the interrogating officer learned from a fellow officer that respondent was wanted on an outstanding warrant for an unpaid fine on a municipal offense. The officers neither verified the existence of the warrant nor informed respondent about it prior to his making the second statement. The warrant's existence was, however, subsequently verified (*See* People's Exhibits 3 & 4).

Respondent's second confession, which was videotaped, lead to the discovery of the murder weapon in the case, *i.e.*, a hammer.

The trial court suppressed respondent's statements and the hammer as being fruits of an illegal arrest. The district attorney's office appealed, claiming, *inter alia*, that because the warrant independently justified respondent's custody, it served as an intervening factor breaking the causal connection between the initial illegality and the acquisition of the second statement and the hammer.

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Colorado Supreme Court disagreed, however, finding, under *Brown v. Illinois*, 422 U.S. 590 (1975), that the warrant could "not constitute an intervening factor sufficient to remove the taint" of the initial illegality because it "did not contribute to the defendant's ability to exercise his free will." *People v. Jones*, 828 P.2d 797, 800-01 (Colo. 1992).[2]

INTEREST OF AMICI CURIAE

The *amici* here have a substantial interest in seeing this holding reviewed because they all have law enforcement responsibilities within their respective jurisdictions. The holding of the Colorado court purports to apply the Fourth and Fourteenth Amendments to the United States Constitution, both of which are binding on the *amici*.

---

[2] Although there was a dispute in the trial court over the manner in which the warrant was issued, the Colorado Supreme Court never addressed this question of state law but instead resolved the federal question on the assumption that the warrant was valid.

REASONS FOR GRANTING THE WRIT

I. The Colorado Supreme Court Has Decided An Important Question of Federal Law Which Has Not Been, But Which Should Be, Settled By this Court. Lower Courts Throughout the Country Are Struggling to Properly Assess the Impact of Police Discovery of Intervening, Independent, and Adequate Grounds to Arrest Upon the Admissibility of Confessions Which Would Otherwise Be Suppressible As Fruits of Illegal Arrests. The Courts Have Inconsistently Applied An Attenuation Analysis, Rather than the Much Simpler and More Appropriate Independent Source Doctrine. This Has Resulted In the Suppression of Highly Relevant and Reliable Evidence For Reasons Wholly Unrelated to Either the Actual Harm Suffered by the Suspect or A Proper Consideration of the Role of Deterring Police Misconduct.

Like nearly every other appellate court, *see* Pet. Cert. at 8-11, the Colorado court analyzed the exclusionary rule issue here from a *Brown v. Illinois* "attenuation" perspective. Despite this apparent agreement, there is a tremendous split among the jurisdictions about how to squeeze independent grounds to arrest into the terms of the "attenuation" analysis.[3] Review is not sought here simply to determine which side of the split should prevail, but

---

[3] As demonstrated in the petition, some courts find intervening, independent grounds to arrest irrelevant, while other courts find those grounds if defendants are confronted with them. Where intervening, independent grounds to arrest are determined to be relevant, some courts consider them as simply one factor to be considered, while other courts find them to be dispositive. *See* Pet. Cert. at 8-11.

because the lack of agreement itself results from the application of the wrong test. The application of the "attenuation" analysis is at odds with basic Fourth Amendment exclusionary rule principles which should result in the use of "independent source" analysis.[4] The problem, of course, is that the differences between the "attenuation" and "independent source" doctrines have, at times, been blurred, particularly in the context of confessions. Review here is necessary, then, to authoritatively demonstrate to the courts across the country that which should always have been evident but which has remained obscure.

Pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963), both the direct and indirect "fruits" of an illegal arrest are excluded as evidence from trial. Ever since *Wong Sun*, however, the issue has been how to determine just what is and what is not a "fruit" of an illegal arrest. The controlling question has been "whether, granting the establishment of the primary illegality, the evidence to which the instant objection is made has been come at by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 487-88. Two situations which the Court in *Wong Sun* recognized would "purge" the "taint" of an illegal arrest were where the government learned of the disputed evidence from or through "an independent source" **and** where the "connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint" of the illegality. *Id.* at 487.

The "independent source" doctrine had its genesis in *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1926); the "attenuation" doctrine, in *Nardone v. United States*, 308 U.S. 338 (1939). The two doctrines differ greatly. An "independent source" for evidence refers to a separate, legitimate avenue for obtaining

---

[4] To date, only one court has used an "independent source" analysis in this context. *See, e.g., Wicker v. State*, 667 S.W.2d 137 (Tex. Ct. Crim. App. 1984).

evidence which serves to displace the initial illegal "cause" for its acquisition. 4 W. LaFave, *Search and Seizure*, § 11.4(a) at 374-78 (4th ed. 1987). "Attenuation" refers not to the displacement of the initial illegality, but to the diminution of its force to a point where the purpose of deterring future police misconduct would not realistically be furthered by excluding the evidence. *Id.* at 374-76.

Since *Wong Sun*, the Court has continued to write about "independent source," *e.g. Murray v. United States*, 487 U.S. 533 (1988), and "attenuation," *e.g. United States v. Ceccolini*, 435 U.S. 268 (1978),[5] but has tended to blur their distinctions. In *Segura v. United States*, 468 U.S. 796, 804-05 (1984), for instance, this Court discussed the independent source doctrine as if it were merely a subset of the attenuation doctrine.

In *Brown v. Illinois*, this Court utilized a multi-factor "attenuation" analysis -- including a consideration of "intervening" factors -- to determine whether a confession was the fruit of an arrest which was illegal because it was lacking in probable cause. The *Brown* Court's ultimate emphasis on determining whether a confession was sufficiently an act of free will apart from Fifth Amendment voluntariness concerns was picked up and indiscriminately used by courts whenever a confession was preceded by some type of police action which rendered the initial arrest illegal. *See* Pet. Cert. at 8-11.

This Court did little to change the perception that an "attenuation" analysis always applied to confessions after an illegal arrest. While the Court recognized that independent, adequate grounds for continued detention could effectively be an independent source for obtaining other types of evidence, *see, e.g., Johnson v.*

---

[5] The Court has also, or course, written about the concepts of "inevitable discovery," *see Nix v. Williams*, 467 U.S. 431 (1984) and "good faith reliance" on warrants, *see United States v. Leon*, 468 U.S. 897 (1984).

Louisiana, 406 U.S. 356, 365 (1972) (lineup identification)[6], it continued to use the multi-factored *Brown* "attenuation" analysis in cases involving confessions. *See, e.g., Taylor v. Alabama*, 457 U.S. 687 (1982). It has never, however, dealt with a confession case involving the impact of intervening, independent grounds to arrest, and it has never suggested that "attenuation" was the only way of "purging" the taint of an illegal arrest from a confession. Although in *Taylor* the Court refused to consider as a "significant 'intervening event'" the acquisition of an arrest warrant before the defendant confessed, *id.* at 691-92, it noted there that the arrest warrant was itself predicated on a comparison of fingerprints found at the scene with those taken from the defendant immediately after his arrest. By implication, the Court might have found the warrant "significant" had it been based on evidence which was itself not the "fruit" of an illegal arrest. *Id.*

It was not until *New York v. Harris*, 110 S.Ct. 1640 (1990), however, that this Court explicitly recognized that the *Brown* "attenuation" analysis was not the exclusive means for admitting into evidence confessions obtained after illegal arrests. In *Harris*, the police had probable cause to arrest the suspect but illegally entered his

---

[6] In *Johnson*, the Court noted:

> The validity of Johnson's arrest, however, is beside the point here, for it is clear that no evidence that might properly be characterized as the fruit of an illegal entry and arrest was used against him at trial. Prior to the lineup, ... he was brought before a committing magistrate to advise him of his rights and set bail. At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by "exploitation" of the challenged arrest but "by means sufficiently distinguishable to the purged of the primary taint."

406 U.S. at 365.

residence without a warrant to make the arrest. The suspect made one incriminating statement inside the residence and another statement an hour later at the police station. This Court held that only the statement made in the house had to be suppressed, because only it was obtained as a result of the specific illegality committed by the police -- the warrantless entry into the house. The stationhouse statement, the Court held, was unaffected by the illegal entry since the police could have subjected the suspect to an arrest outside the house and thereafter taken him down to the station for questioning.

In *Harris*, the Court refused to engage in *Brown*'s multi-factored "attenuation" analysis to determine what effect the fact of lawful custody had on the suspect's exercise of his free will. *Id.* at 1643. Rather, it recognized what it had only implied in *Taylor*, *i.e.*, that a confession cannot be the product of an illegal arrest if the police otherwise have legitimate grounds for holding the individual in custody at the time he or she confesses.

This ought to be the controlling principle here. While, unlike *Harris*, the police did not have adequate grounds at the outset to arrest respondent, like *Harris* they did have adequate, untainted grounds to retain custody of respondent prior to the time he made his second stationhouse statement. As in *Harris*, there could be no valid claim that, after learning of the outstanding warrant, the police here were required to release respondent or that respondent could not be immediately rearrested if momentarily released. *Id.* at 1643. *Cf.*, *Government of Virgin Islands v. Gerau*, 502 F.2d 914, 925 (3rd Cir. 1974) (issuance of a warrant for arrest for failing to appear in court created grounds for fictional "rearrest, providing police with legal custody at time defendant made statements); *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989) (after illegally stopping individual, police recognized him as person wanted on an outstanding arrest warrant; held, this "constitutes an intervening circumstance **sufficient to break** the causal connection between the stop and the lineup") (emphasis added).

Harris' "controlling factor" or "independent source" type of analysis is not defeated (as the Colorado court might believe) simply because at the time the police neither verified the existence of the warrant nor explicitly relied upon it as a basis for questioning respondent. With respect to the first point, the issue is not so much the timing of the verification, as the determination at some point in time that the warrant did exist at the time when respondent confessed. *Cf.*, *Whiteley v. Warden*, 401 U.S. 560 (1971) (fellow-officer action will be upheld, if adequate grounds are ultimately determined to have been in the hands of the officer or agency which issued the information). *See also* 2 LaFave, *supra*, § 3.5(d) at 20 n.71. With respect to the second point, this Court, in *Scott v. United States*, 436 U.S. 128, 138 (1978), recognized that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify that action."

Here, the warrant did indeed exist at the time of respondent's confession, and while the police may have originally relied upon the wrong bases for taking respondent into custody, they were aware of proper grounds upon which to retain custody of him prior to his confession. The exclusionary rule exists, not as a personal right of defendants, but as a means of deterring future police misconduct. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). Because of the substantial and adverse impact it has on the societal interest in punishing criminals, the exclusionary rule is not to be applied where its deterrent effect is, at most, *de minimis*. *E.g.*, *Harris*. That is the case here. Respondent had no Fourth Amendment right to liberty once the police discovered alternate and adequate grounds upon which to detain him; and, as one leading commentator has noted, deterrence would be a legitimate concern in this type of context only if it "may be assumed [that] police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of which they are presently unaware. That assumption, in my view, is fanciful."

1 LaFave, *supra*, § 1.4(d) at 90.

The Colorado court's analysis has unnecessarily deprived the public of highly relevant and reliable evidence upon which to determine guilt in a case involving the most serious of crimes, *i.e.*, first-degree murder. That is troubling enough. But when the decision is viewed in a broader context, *i.e.*, essentially as standard fare throughout the country, then the critical need for this Court's review and correction of analysis is evident. Confessions following acquisition of proper and independent grounds for custody should not be subjected to the *Brown v. Illinois* test, which has been criticized as constitutionalizing the discretion of trial courts. *See* 4 LaFave, *supra*, § 11.4(b) at 392. The time is ripe for this Court to authoritatively find that the deterrent effects on police are too insignificant to impose upon the public the substantial cost of suppression where the suspect has suffered virtually no Fourth Amendment harm from the custody leading up to his confession.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that this Court issue a writ of certiorari to review the Colorado Supreme Court decision *People v. Jones*.

GALE A. NORTON*
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

Attorneys for *Amici Curiae*

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-3057
***Counsel of Record**